THE RISK OF LOSS AFTER AN EXECUTORY CONTRACT OF SALE IN THE CIVIL LAW.

IN the Institutes of Justinian it is laid down:[1] "As soon as the contract of purchase and sale is made, which is, if the transaction is without writing, when the price is agreed, the risk of the thing sold immediately falls upon the buyer, although it has not yet been delivered to him. Thus, if the slave dies or is injured in any part of his body, or the whole or any part of the house is burned, or the whole or any part of the land is carried away by flood or is diminished or injured by an inundation or by a tempest which overthrows the trees, it is the loss of the buyer, who must pay the price though he does not receive the thing," and though, it may be added, delivery was necessary according to the Roman law for the transfer of title, as it is generally in the modern civil law.

This view seems to have been little questioned by the Roman writers, though Africanus says that if the treasury seizes upon an estate which the owner has agreed to sell but has not delivered, the owner, though not liable for damages, must restore the price.[2] This text led Cujacius to maintain that by the Roman Law the risk remained with the seller until delivery, but the text was reconciled by other writers as depending upon the particular facts of the case. Thus Voet says:[3] —

"There the question was as to a farm, which, though captured from the enemy, for the time had been left to its former owner, but afterwards had been confiscated owing to urgent necessity or public utility, as it appears may be done. Since, therefore, the seller could not prevent this confiscation, it would have been unjust for the buyer to be bound, because the seller ought to have warned an ignorant buyer that the land was in a position where it might be confiscated at the will of the Prince; and if he did not do this, he is held to restitution of the price, as if on account of some latent defect of the thing."

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[1] Lib. iii. Tit. xxiii. 3. The rule seems to be of great antiquity, and Dr. Franz Hofmann endeavors to show that it is of Greek origin. Periculum beim Kauf (Vienna, 1870), pp. 169–188.

[2] Dig. Lib. 19 (locati conducti), 2, 33, quoted by Pothier, Contrat de Vente, § 308.

[3] Compendium Juris, Lib. 18 Pandectarum, Tit. vi. De Periculo, 1.

In order to transfer the risk to the buyer, it was necessary that there should be *emptio perfecta*. The obligation of the parties to go forward might be complete, yet the sale might not be perfect. To make a perfect sale it was necessary for the bargain to be unconditional, to relate to specific goods, and for the price to be certain.[1] If a sale was subject to a suspensive (or precedent) condition, and the subject matter was destroyed before fulfilment of the condition, the loss fell on the seller, since the obligation could never become complete; but if the injury to the subject matter did not destroy it or change its identity, the loss fell on the buyer, if the condition was fulfilled, for the fulfilment was held to relate back to the time when the agreement was concluded. If a resolutory (subsequent) condition was attached to a bargain, the risk of destruction nevertheless passed immediately, but the risk of injury not amounting to destruction did not necessarily pass for such injury, would not prevent the rescission of the contract by the happening of the condition; and if the condition were dependent on the will of the buyer, he would naturally exercise his right.[2] A sale was also imperfect if the amount of the price was not exactly determined, or if the goods were not exactly defined. Thus, in sales by count, weight, or measure, the risk did not pass to the buyer till the goods were counted, weighed, or measured. This was so where a definite quantity or proportion of a specified mass was sold at a price to be determined by calculation when the goods should be counted, weighed, or measured;[3] and it has even been held that though the whole of such a mass were purchased, the transaction should be regarded in the same way,[4] but the contrary view certainly seems more sensible.[5] So if a fixed proportion of a specified mass were

[1] "Si id quod veneriet appareat quid quale quantum sit, sit et pretium, et pure venit, perfecta est emptio." Dig. 18, 6, 8. Pothier, Contrat de Vente, § 309; Moyle, Contract of Sale in the Civil Law, 77.

[2] Moyle, Contract of Sale, 78–82; Pothier, Contrat de Vente, §§ 311–313; Voet, Compendium Juris, Lib. 18 Pandectarum, Tit. vi. 4. Compare Code Civil, § 1182.

[3] Moyle, Contract of Sale, 84, 85; Pothier, Contrat de Vente, § 309; Code Civil, § 1585.

[4] Moyle, Contract of Sale, 84, citing Demante, Cours Analytique de Code Civil, vii. p. 10; Pothier, Contrat de Vente, § 309. So in Peterkin *v.* Martin, 30 La. An. 894, 896, it is laid down: "There can be no sale in lump except for a lumping price." This is because by the civil law to make a perfect sale it is necessary that the price as well as the goods should be ascertained.

[5] Aubry & Rau, Cours de Droit Civil Français, 4th ed. iv. § 349, p. 341, citing Duvergier, i. 90, Dijon, 13 décembre, 1867, Sir., 68, 2, 311. As delivery is no longer necessary in France for the transfer of title, the title in the case supposed would in that country pass to the buyer; and if the risk remains with the seller, the curious case is

purchased, that should also be regarded as a sale *per aversionem*, — that is, a sale of a specified thing for a lump sum.[1] After the risk had passed to the buyer, the seller before delivery was liable for wilful default (*dolus*), and also negligence (*culpa*), whether gross or slight, unless the buyer were in default (*mora*) in receiving delivery, in which case the seller was thereafter only responsible for wilful default.[2] If the seller were in default in making delivery, the property was thereafter at his risk.[3]

The reason uniformly given by the older writers in support of the doctrine of the Roman law, that the risk passes as soon as there is *emptio perfecta*, though the title has not passed, is thus expressed by Noodt:[4] "The buyer, as soon as the bargain is made, is a creditor of the thing sold. The seller, on the other hand, is a debtor. By the natural destruction of it, the debtor of a specific thing is freed from his debt."[5] This argument is, of course, sufficiently conclusive to prove that the seller is freed from liability, but it does not prove that the buyer is liable. That it is assumed to have this effect would naturally induce the belief that the Roman law did not have the principle of the English law, that if one party to a contract of mutual obligation is excused from performing by the impossibility of performance, the other party is likewise excused; or, as it may be put more tersely, impossibility excuses breach of a promise, but not breach of a condition, whether express or implied. Certainly writers on the civil law prior to this century did not so understand the law,[6] or the insufficiency of their argu-

presented of a seller retaining the risk after he has parted with title and perhaps possession. But such, it seems, is the law of Louisiana. It was so held in Shuff *v.* Morgan, 9 Martin, 592. In Larue *v.* Rugely, 10 La. An. 242, however, the court expressly leave open the question whether transfer of possession as well as title would transfer the risk. See also Goodwyn *v.* Pritchard, 10 La. An. 249; Peterkin *v.* Martin, 30 La. An. 894.

[1] Moyle, Contract of Sale, 86.

[2] Voet, Compendium Juris, Lib. 18 Pandectarum, Tit. vi. 2.

[3] Ibid. Tit. vi. 3. See also Moyle, p. 87.

[4] Lib. xviii. Tit. vi.

[5] See also Voet, Lib. xviii. Tit. vi.; Sandars' Justinian, Hammond's ed., p. 446; Pothier, Contrat de Vente, § 308; C. G. Wächter, Archiv. f. civil Pr., xv. 97 (1832). See also, Moyle, p. 90.

[6] Thus Pothier, Contrat de Vente, § 308, states that though Barbeyrac and Puffendorf object "that the buyer's obligation to pay the price is dependent upon the condition that the thing sold shall be delivered to him, I deny the proposition. The buyer is under an obligation to pay the price, not upon condition that the seller shall give him the thing, but rather upon the condition that the seller is on his part obliged to cause him to have the thing; it is sufficient, therefore, if the seller is legally subject to such obligation, and does not fail in its performance, in order that the obligation of the buyer may have a cause and subsist."

ments as to risk would have been apparent. Nevertheless, there is a text in the Digest which covers the case.[1] At the present day the general rule in the civil law is almost universally recognized to be the same as in the English law.[2]

It only remained, therefore, for the civilians to find another and better reason, or to change their rule. The subject has been a popular one with legal writers on the Continent of Europe, especially in Germany; and many and various have been the reasons, theoretical and practical, suggested. It is not necessary to examine all of them,[3] but three lines of reasoning seem entitled to consideration, —

1. The buyer is entitled to the *commodum rei*, and the *periculum rei* should always go to the same party. But there is no *commodum rei* that can be classed with the risk of destruction. Changes in the pecuniary value of the subject matter of a bargain have of course no effect upon it. But if a case can be supposed of an accidental change in the subject matter of a contract of sale, so that it is no longer substantially the same thing, it is not certain that the seller would be bound to perform.[4] As this argument rests on an assumption which, though it cannot be disproved, cannot be proved, it does not advance the discussion.

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[1] Dig. 19, 1, 50. "Bona fides non patitur, ut, cum emptor alicujus legis beneficio pecuniam rei venditae debere desisset antequam res ei tradatur, venditor tradere compelletur et re sua careret."

[2] Windscheid, Lehrbuch des Pandektenrechts, § 321, 3; Hofmann, Periculum beim Kauf, pp. 8, 9. Both writers cite a number of other authorities. Some authorities, however, still maintain that in order to make out the *exceptio non adimpleti contractus* it is necessary that the plaintiff shall be in default in the performance of his obligation, — not simply have failed to perform it under circumstances making his failure excusable. A few writers hold that a bilateral contract consists of two wholly independent promises. See citations above.

[3] As an illustration of the fertility of the Teutonic intellect when in search of a reason, the suggestion of a writer, not inaptly named Goose, may be mentioned. He says, "even if the buyer were not required to pay the price, he would be injured by the calamity, for the thing purchased was of more value to him than the money; the seller also, would not be freed from loss, for the money was worth more to him than the thing. If the buyer is required to pay the price, he only suffers loss. A contrary view would be very like the justice of St. Crispin, only worse. It injures both, and indemnifies neither." Jahrb. f. Dogm., ix. § 203. So able a writer as Ihering puts forward as the reason of the rule the theory that failure to make an immediate delivery and transfer of title is generally due to the wrongful delay of the buyer, and that to prevent controversy, the law assumes this to be always the case. Jahrb. f. Dogm. iii. 463–465.

[4] "It is said, 'the buyer is not unfairly treated, the *commodum* also belongs to him.' This is only saying that the *commodum rei* and the *periculum rei* must always fall to the same party, but to which one?" Hofmann, p. 33.

2. Immediately after the contract, the seller can no longer deal with the subject matter of it freely for his own benefit. His hands are tied. If an accident befalls the thing, and the loss is thrown upon the seller, he has incurred a loss because of holding the thing for the seller's benefit instead of disposing of it otherwise. But it must be observed that every bilateral contract, if the parties respect their promises, involves the consequence that neither party is as free as he was before; and in a contract of sale the loss of freedom on the part of the buyer is just as real, and just as much for the benefit of the other party, as is the seller's sacrifice. True, the seller's obligation relates to a specific thing; but, generally speaking, the only result of a failure by the seller to have the thing ready for delivery is liability in damages to the buyer, and the latter suffers the same consequence if he has not the price ready at the appointed time.

3. Windscheid's explanation[1] is that the contract of sale itself is from its very nature in effect an alienation of the thing sold. A contract of sale, he says, is an immediate declaration of surrender of the owner's rights in a thing (Entäusserungserklärung). "It has for its content that the thing sold is given; it is not that an obligation is undertaken to give it. An obligation on the part of the seller first arises when the actual state of affairs does not correspond to the declaration." It is another and somewhat less carefully analyzed way of saying the same thing, to say that when a contract of sale is entered into, an immediate completion is ordinarily expected and a delay is accidental. This line of argument in a sense includes also the reason given in the preceding paragraph. It may be doubted whether the parties to a contract to sell at a future day, look at the matter in this way; and it is not unlikely that Windscheid was led to adopt his view in order to furnish an explanation of the rule of the Roman law as to risk.

The reasons brought forward in support of the doctrine of the Roman law seem generally to have been thought inadequate by European legislators. In France the risk of loss now remains with the seller until the title passes;[2] in Prus-

[1] Lehrbuch, § 321, 3. A similar theory is expressed in Austin on Jurisprudence, 4th ed. p. 1001.

[2] This change in the French law has been effected by putting back the time of the transfer of title to the time of the contract. Code Civ., art. 711, "La propriété des biens s'acquiert . . . par l'effet des obligations." Art. 1138. "L'obligation de livrer la chose est parfaite par le seul consentement des parties contractantes. Elle rend le créancier propriétaire et met la chose à ses risques dès l'instant où elle a dû être livrée,

sia [1] and Austria [2] until delivery, which is also generally the moment when the title passes.[3]

If the risk remain with the seller until delivery or transfer of title, few subsidiary questions can arise; but if the general doctrine of the Roman law is followed, endless arguments are still open as to the correctness of the conclusions of that law in the case of conditional contracts.[4] A favorite matter of dispute also is the case of successive agreements by a seller with two persons to sell each the same thing. Every possible view has its champions, that the seller can recover the price from the first buyer only, from the second buyer only, from neither buyer because the seller can prove against neither that the thing was being held for him, that the decision depends on whether the second sale was made in good faith,[5] and finally Ihering maintains that whether the seller has acted in good faith or not, he may recover the price from either buyer he wishes.[6] This seems almost a *reductio ad absurdum* of the Roman theory.

No difference was made by the Roman law, or seems to be made by the modern civil law, on this subject, between movable and immovable property. By the Roman law a contract of sale before actual transfer of title, gave the purchaser a purely personal right against the seller; and if the contract was not performed, the buyer could only be compelled to pay damages. He could not get the thing itself.[7] If the seller, in violation of his contract, sold and delivered the thing to a third person, the latter acquired title, and

encore que la tradition n'en ait point été faite." The French law is, therefore, now quite similar to the English; and the rule of French law that *en fait de meubles possession vaut titre* bears some analogy to the rule generally prevailing in this country, that as regards an innocent third person, delivery is necessary, though unnecessary so far as the buyer and seller are concerned.

[1] Gesetzbuch, § 100, I. Teil, XI. Titel.; Hofmann, p. 46.

[2] Gesetzbuch, §§ 1048–1050, 1064; Hofmann, p. 52. If a time for delivery is fixed by the contract. After that time the risk is transferred to the buyer.

[3] The case may arise, certainly in the case of real estate, where delivery is made but title has not passed, because a necessary formality has not been complied with. In such a case it is held, in Prussia at least, that the risk is upon the buyer. Entscheidungen des Rechtsgerichts, Civilsachen, vol. 7, p. 241.

[4] See *ante*, p. 73.

[5] This case is not so improbable as appears at first sight. Thus an owner of property might contract to sell it after an authorized agent had made a similar contract.

[6] For the learning on this subject see Hofmann, pp. 137–153; Martinius, Der Mehrfache Kauf (Halle, 1873); Windscheid, Lehrbuch, § 390, clause 3; Ihering, Jahrb. f. Dogm. iii. 474.

[7] This is expressed by the maxim *Nemo Potest præcise cogi ad factum*. Pothier, Obligations, Part i. ch. ii. art. 2, § 2; Fry, Spec. Perf., § 6; Holland, Jurisprudence, 6th ed. pp. 283, 284.

even though he knew of the prior contract, was apparently under no liability.[1] In the modern civil law the remedy of specific performance seems to be generally adopted;[2] and, since the adoption of a system of registering deeds and contracts, relating to land,

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[1] This is still the law to a great extent. It is true that Pothier says of the original purchaser in such a case (Contrat de Vente, § 320), "He cannot reclaim the thing against the second buyer, who purchases it in good faith, *inscius prioris venditionis.*" Pothier, however, does not make the positive statement that the thing might be reclaimed from one who purchased the thing in bad faith. On the other hand, in Aubry & Rau, Cours de Droit Civil Français, 4th ed., ii. p. 55, in discussing the doctrine of modern French law, that a second purchaser, in good faith, to whom the thing is delivered acquires a superior right to the first purchaser, to whom no delivery was made, though the latter has title, the authors say: "D'ailleurs il ne faut pas perdre de vue que la préférence n'est accordée au second acquéreur qu'autant qu'il est de bonne foi; et cette condition nese comprendrait pas en principe, si la propriété des meubles corporels ne vait se transférer à l'égard des tiers que par la tradition." That is, the fact that the original purchaser has a remedy against a second purchaser with notice necessarily implies that the original purchaser had title as distinguished from a contractual right. See also Knox *v.* Payne, 13 La. An. 361.

In Germany, according to the old common law, the purchaser of real estate was protected more fully than by the English law. Stobbe (Handbuch des Deutsches Privatrecht, § 175) says: "If the owner of an estate engages to transfer it to another, and afterwards conveys it to a third person, according to the law of the middle ages, the first appears to have been preferred to the second purchaser, and to have had an action against him for surrender of the estate, in case he had not acquired through lapse of time lawful seisin. To a certain extent this principle belongs to later law also, but with this limitation that the second purchaser is only liable in case of bad faith." Mr. Julian W. Mack of Chicago, whose studies in Germany have made him fully acquainted with the matter, writes me that the new draft civil code, intended to apply to the whole German Empire, but not yet adopted, "is to retain as far as possible Roman theories, modified only by such regulations as result from the 'Grundbuch' (land registration). At least in the original edition of the code, the contract was not recognized as having any binding effect on the property, either real or personal, even as against the purchaser with notice."

Further, creditors of a seller by the Roman law might seize the thing sold at any time before delivery, even though the price had been paid. Pothier, Contrat de Vente, § 321. This was the law of Scotland until 19 & 20 Vict. c. 60, §§ 1 & 2. See Moyle, Contract of Sale, 135; Bell, Principles of the Law of Scotland, § 86.

[2] A learned reviewer of the third edition of Fry on Specific Performance, questioning an opinion expressed in that work, that specific enforcement of contracts probably has a more extensive application in England than on the Continent of Europe, says (8 Law Quarterly Review, 251): "If we had to express the difference between English and Continental law in this respect in a few words, we should say that in England specific performance is granted where damages are not an adequate remedy, whilst on the Continent damages are awarded when specific performance is impossible, and also that the means of enforcement are more varied on the Continent than in England." This statement seems borne out by quotations from French and German authorities. Demolombe, Traité des Contrats, 2d ed. vol. i. p. 486; Dernburg, Preussisches Privatrecht, 3d ed. vol. i. p. 276; Forster-Eccius, Preussisches Privatrecht, 4th ed. vol. i. pp. 551, 899; German Code of Civil Procedure, §§ 769–779.

one who has entered into a contract for the purchase of real estate may, in some jurisdictions, by recording his contract, acquire a right against any one who thereafter takes title.[1] These changes in the law do not seem, however, to have been considered by writers as making any difference in the risk after a contract of sale. Registration laws and specific performance are not referred to in that connection.

It is obvious that the extent of the right to the thing itself which a buyer acquires immediately on the completion of a contract might well be a consideration of great importance. If the buyer acquires by a recorded contract for the purchase of an estate an absolute right against the world to have that property upon paying the price, there is given to the argument of Windscheid quoted above, that a sale is itself an alienation of the property, a force which it does not otherwise possess. It has been because of the control which the buyer of real estate acquires immediately upon the formation of a contract of sale that the English court of chancery and the courts of some of the United States have held that the contract makes the buyer at once the owner in equity, and the loser by the injury or destruction of the property. But this reasoning seems peculiar to English and American law.

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[1] In France, in 1855, a law was passed having the same general effect as the registration laws generally in force in this country. See Aubry & Rau, Cours de Droit Civil, 4th ed. ii. p. 56 et seq., 286 et seq. Under this law contracts to sell real estate as well as conveyances may be recorded; and consequently, if recorded, insure the purchaser a right against any one who in fraud of the contract thereafter obtains a conveyance. In Germany registration laws are now generally in force. In some States registration is a necessary element in the transfer of title; in other States it has no more importance than in this country. In Prussia title passes by registration, even though the buyer knows of a previous contract; and so in some other States. Stobbe, Handbuch des Deutsches Privatrecht, § 95. By the draft civil code, Mr. Mack informs me, a contract is not recognized as a document to be recorded.